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The United Kingdom has spoken: The receding impact of European jurisprudence on the UK interpretation of the common VAT system

Yige Zu* and Richard Krever**

Abstract

Post-Brexit, UK law conforming to Directives of the European Union such as the value added tax (VAT) Directive will remain in effect and UK courts will be permitted to consider decisions of the Court of Justice of the European Union (CJEU) when interpreting that law. How UK common law courts, steeped in the tradition of the doctrine of precedent, will use CJEU judgments in the post-Brexit era has been the subject of much speculation. This article considers the question in the context of a case study, looking at the application by UK courts of CJEU decisions in an important area of VAT law, the treatment of customer loyalty plan benefits. The evidence suggests that, even prior to Brexit, UK courts had started to pursue a separate path, declining to follow CJEU precedents that yielded clearly inappropriate policy outcomes. If the results of the case study are replicated more widely in UK rulings, it can be expected that the influence of CJEU judgments may taper off where formalistic and literalist CJEU interpretations have led to outcomes inconsistent with the recognized policy intent of UK law.

Keywords

Doctrine of precedent, CJEU, Brexit, value added tax, loyalty schemes, UK Supreme Court, preliminary rulings

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Introduction

It would have been remarkably prescient for an observer to suggest a seemingly innocuous case at the close of the 20th century on the taxation of customer rewards provided under loyalty programmes, a ubiquitous feature of modern commerce, could have led almost a decade and a half later to an apparent schism between the UK courts and the highest court in Europe. The schism arose in the Supreme Court's decision in *Her Majesties Revenue Customs v Aimia Coalition Loyalty UK Limited* (formerly known as *Loyalty Management UK Limited*),¹ a judgment that may provide one of the best guides available to the use of Court of Justice of the European Union (CJEU) decisions by UK courts after the UK's separation from the European Union (EU).

While tax law, like so much of modern commercial law, is a product of statute, its terms are interpreted by courts, in the UK by courts steeped in a common law tradition built on the doctrine of precedent intended to provide consistency in interpretation for all persons subject to the same law. Following the UK's admission to the European Economic Community (EEC) in 1973, UK courts found themselves in a wholly new legal status when interpreting domestic law, subordinate in hierarchy to an extra-national court. By virtue of the treaty to which the UK had acceded, the EEC and later EU, as the community evolved, law issued, inter alia, in the form of Directives² was paramount and national laws were inoperative or inapplicable if inconsistent with the European legislation.³ When in doubt about how a governing Directive applies to a particular fact situation, national courts are allowed to refer the question to the European Court of Justice (ECJ) or CJEU, as the institution became known, for a preliminary ruling.⁴ Subject to limited exceptions, a final court of appeal, the Supreme Court in the case of the UK, was required to do so if the issue concerned the application of EU treaties or acts of its institutions.⁵ The CJEU, in turn, was obligated to provide the ruling sought,⁶ unless it concluded it lacked jurisdiction in the matter.⁷ The national court was then, in principle, required to apply the CJEU ruling when issuing a decision on the dispute before it.

UK courts quickly adapted to the new environment and referrals to the CJEU became commonplace where UK statutes were required to conform with EU law. There were, to be sure, instances in which UK courts bypassed the CJEU when interpreting a UK statute that

¹ *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited* (formerly known as *Loyalty Management UK Limited*) [2013] UKSC 15; [2013] STC 78 (SC).

² Directives are European laws that, under Article 288 of the Treaty on the Functioning of the European Union (TFEU), are binding on the member states to which they are addressed. They are not directly applicable but rather member states are required to implement a Directive through domestic legislation.

³ As the UK Supreme Court explained in *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 at para 60, due to the passage by the UK Parliament of the *European Communities Act 1972*, 'EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes.'

⁴ Art 267(2) TFEU.

⁵ Art 267(3) TFEU. See C-416/17, *European Commission v France*, EU:C:2018:811.

⁶ There is a very limited space in exceptional circumstances in which the CJEU may refrain from giving a preliminary ruling; see M Broberg, 'The Preliminary Reference Procedure and Questions of International and National Law' (2009) 28 YEL 362, 372.

⁷ See, eg C-583/10, *United States v Nolan*, EU:C:2012:638.

was subject to overriding EU law,⁸ even if one party or both parties had asked the court to seek a CJEU preliminary ruling. The UK court may have made a decision on other substantive points or reached conclusions regarding the facts of the case that made the EU law question otiose,⁹ concluded the issue was one of fact, not law,¹⁰ or may have reasoned that the matter was *acte clair*,¹¹ requiring no further guidance or clarification from the CJEU.

UK courts accepted the supremacy of the CJEU in the case of referred questions and applied CJEU decisions when the references returned to the UK. In the words of Lord Carnwath, ‘Luxembourg has spoken’.¹² In other cases, while the CJEU, outside the realm of the common law, was not obliged to follow a strict rule of precedent,¹³ its judgments were binding on UK courts in respect of the point of law in the same sense as binding precedents in the common law.¹⁴

The legislation governing the implication of Brexit for UK courts, the *European Union (Withdrawal) Act 2018*, requires UK courts to interpret retained EU law “in accordance” with retained EU and domestic case law,¹⁵ but the directions do not extend to domestic UK statutes such as the *Value Added Tax Act*¹⁶ that have been drafted to conform to requirements of an EU law. There has, not surprisingly, as a consequence been much speculation on how influential both prior and future CJEU judgments will be in the post-Brexit era. Empirical evidence suggests UK courts were less inclined to seek rulings from the CJEU following the Brexit referendum.¹⁷ Will this reluctance evolve into increasing departures from CJEU precedents in the future? One approach to answering the question has been to look for analogies in previous exits from legal systems that relied on a foreign court with final authority to interpret domestic laws such as Commonwealth countries that replaced the Privy Council with national final courts of appeal, severing any *stare decisis* role for UK judgments.¹⁸

⁸ See further A Arnull, ‘The UK Supreme Court and References to the CJEU’ (2017) 36 YEL 314.

⁹ See, eg *In the matter of A (Children) (AP)* [2013] UKSC 60.

¹⁰ See, eg *R. (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport & Anor* [2014] UKSC 3.

¹¹ See, eg *The Office of Fair Trading v Abbey National plc & Others* [2009] UKSC 6; *Russel & Others v Transocean International Resources Limited & Others* [2011] UKSC 57.

¹² *Her Majesty’s Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)*, (n 1) following para 119. Lord Carnwath offered this observation in dissent in the context of an appeal of a UK decision based directly on a CJEU ruling. It encapsulates well the general view of UK judges on the binding nature of CJEU precedents in UK-origin cases.

¹³ A. Arnull, *The European Union and its Court of Justice* (2nd edn, OUP 2006), 627.

¹⁴ See *European Communities Act 1972* (c. 68), s 3(1): “For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such *in accordance with the principles laid down by and any relevant decision of the European Court*) (Emphasis added).

¹⁵ *European Union (Withdrawal) Act 2018*, s 6 (3).

¹⁶ Currently the *Value Added Tax Act 1994* c. 23. Predecessor laws were the *Value Added Tax Act 1983* c. 55 and the *Finance Act 1972* c 41.

¹⁷ A Dyevre, M Glavina, N Lampach, M Ovádek and W Wijnltiet, ‘Uncertainty and legal institutions: The impact of the Brexit vote on EU law application in the UK’ (Centre for Economic Policy Research VOX, 22 November 2018) <<https://voxeu.org/article/brexit-vote-and-eu-law-application-uk>> accessed 11 August 2019.

¹⁸ See, eg P Giliker, ‘Interpreting Retained EU Private Law Post-Brexit: Can Commonwealth Comparisons Help Us Determine the Future Relevance of CJEU Case Law?’ (2019) 48 CLW Rev 15.

There is, however, as noted earlier, at least one area of law that may provide some insights into the approach UK courts might follow post-Brexit, the application of Value Added Tax (VAT) law to customer loyalty schemes offered by UK retailers and service providers. It is arguable that in this area UK courts began their exit from CJEU authority some time before the question concerning the impact of Brexit arose. It remains to be seen if this area proves to be an outlier or a portend of things to come.

The VAT was one of the first imports from Europe into UK law. A product of design and policy derived from continental turnover tax law, the VAT was built on a foundation far different from the predecessor indirect tax in the UK, the Purchase Tax that had been adopted in 1940 to help fund the war effort. Incorporated into Finance Act 1972, the VAT was adopted as a condition of entry to the EEC with the tax applying to transactions from April the following year, shortly after the UK became a full member of the Community. The UK VAT law was required to conform to an EU VAT Directive, designed to harmonize the tax across the European Union.¹⁹

As the UK statute had to be read subject to the VAT Directive, the CJEU was the final arbiter of conflicts between the tax authority and UK enterprises that believed the interpretation adopted by the UK revenue authority, HM Revenue and Customs (HMRC), was inconsistent with the terms of the Directive. The UK, a jurisdiction home to many enterprises accustomed to litigating unwanted tax assessments, had, as a consequence, generated a large number of tax appeals to the CJEU, the numbers no doubt bolstered by UK judges happy to hand over to the EU arbiter VAT questions that ultimately would be governed by an EU Directive. Between 1973 when the UK became a member of the EEC and 2009 when the final appellate functions of the House of Lords were transferred to the Supreme Court, VAT case referrals to the CJEU from the House of Lords accounted for the second largest group of requests for preliminary rulings from that Court, second only by a small margin to all social policy issues.²⁰

This article considers the application of VAT law to customer loyalty schemes, the programmes by which suppliers reward customers with ‘free’ gifts when specified loyalty thresholds are reached. Unknown when the predecessor to the EU made adoption of the VAT mandatory for member states and drafted the first EEC (as it then was) Directive on the law in 1967, loyalty schemes in a variety of forms are now a pervasive feature of most daily shopping routines. Coffee drinkers get credits towards free coffees, hotel users and frequent flyers receive points for rooms and travel, and supermarket shoppers accumulate entitlements to a range of vouchers, gifts, or rebates. Commerce changed but the VAT law did not and judges applying long-standing VAT principles had to work out how to fit new wine into old bottles, considering whether loyalty rewards were genuine gifts or instead distributions of

¹⁹ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, replacing Sixth Council Directive of 77/388/EEC 17 May 1977.

²⁰ A Arnall, ‘The Law Lords and the European Union: Swimming With the Incoming Tide’ (2010) 35 EL Rev 57, 62. The House of Lords requested 10 preliminary rulings on social policy issues, of which 80 percent concerned gender equality issues.

goods and services for which customers had already paid when they accrued entitlements to future rewards.

Value added taxation

The story of UK and EU judicial convergence and divergence in the application of VAT to loyalty schemes begins with the adoption of VAT in the UK in 1973. The VAT had been first theorized independently by Carl Friedrich von Siemens, a German industrialist,²¹ and Thomas S Adams, an American economist half a century prior to its adoption.²² The Great Depression and Second World War distracted governments around the globe from any consideration of the theory. Following the end of war, the UK retained the Purchase Tax, a multi-rate tax on goods, it had adopted early in the war and continental European countries continued to apply the turnover taxes they had used prior to the war. These taxes applied at low rates to every sale along the production chain, leading to sometimes serious cascading and consequent economic distortions.

The post-war economic rebuilding provided an opportunity for governments to rethink the merits of the VAT. Looking for a means to mitigate the cascading problem of the turnover taxes, in 1948 French authorities experimented with a limited rebate system in one of the turnover taxes to return input tax on purchases to business customers. The idea was modified and expanded in the 1950s but the scope of the turnover tax with rebates was limited and the cascading turnover tax continued to prevail in both France and elsewhere in Europe.

In the earliest stages of the European community, member states realised existing compounding turnover taxes were incompatible with a common market.²³ The consequences of the fragmented turnover tax system had become acute by the time the initial coal and steel common market had evolved into the EEC, with turnover taxes seriously distorting competition between domestic suppliers and suppliers in another member state. The breakthrough for the VAT came in the early 1960s when the EEC realized the cascading turnover taxes built into the cost of acquisitions by European businesses were a severe impediment to the single market as they rendered many, if not most, cross-border sales uncompetitive while providing enterprises located in countries outside Europe with no turnover taxes with a significant cost advantage. The solution recommended by a committee commissioned by the EEC was adoption of a VAT.²⁴ The model proposed by the committee headed by German economist Fritz Neumark retained the existing turnover taxes, simplifying the transition for most countries, but offered a rebate of all tax included in the price of goods and services sold to registered business customers, shifting the tax burden fully to final consumers.

²¹ CF von Siemens, *Veredelte Umsatzsteuer* (Siemensstadt, 1920).

²² TS Adams, 'Fundamental Problems of Federal Income Taxation' (1921) 35 QJ Econ 527.

²³ The problems were thoroughly canvassed in the study commissioned by the predecessor to the European Economic Community, the European Coal and Steel Community. See Committee of Experts (J Tinbergen, Chair), High Authority of the European Coal and Steel Community, *Report on the Problems Raised by the Different Turnover Tax Systems Applied within the Common Market* (March, 1953).

²⁴ Fiscal and Financial Committee, Commission of the European Communities (Fritz Neumark, chair), *Report of the Fiscal and Financial Committee on Tax Harmonization in the Common Market* (1963).

The tax is imposed on the gross consideration payable for supplies of goods and services made by registered businesses, known as ‘taxable persons’ in VAT law, and customers of registered businesses receive a ‘tax invoice’ indicating the amount of VAT that has been included in the price of any taxable supply. As noted, to ensure the tax burden falls only on final consumption and not businesses along the supply chain to final consumption, registered business customers are provided with what is termed in the UK a “credit” for the VAT incurred on inputs (commonly called an “input tax credit”), which can then be deducted from the tax collected from customers.²⁵ An amount net of the recovered VAT must be remitted to the tax authority and, if taxable acquisitions exceed taxable sales, the excess of input tax on the acquisitions over output tax on the sales is refunded to the businesses.

The crucial and fundamental principle underlying VAT policy is that the tax should apply to the total consideration paid by final consumers and only this amount. As the current EU VAT Directive explains,

“The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.”²⁶

Kuwait Petroleum and the slippery slope to double taxation

The potential application of VAT to loyalty programmes began in 1990 with a disputed assessment of discounted sales by Boots, a large chemist chain. Customers making purchases at Boots shops were provided with discount coupons with nominal face values that could be applied towards the amount due on a future purchase. Boots accounted for VAT on the later sales using the discounted amount paid by its customers as the total consideration for the supplies. The agency responsible for administering the VAT in the UK at the time, the Commissioners of Customs and Excise, reassessed Boots for VAT on the full price of the goods, including the face value of discount vouchers tendered by the customers. Boots was successful with its appeal to the CJEU, *Boots Co plc v Customs and Excise Commissioners*,²⁷ which found the vouchers were not consideration for a supply but merely evidence of the customer’s entitlement to a discount on the purchase. As a result, VAT was payable only on the amount paid after applying the discount value of the coupons.

The scheme used by the retailer in *Boots* may have engendered customer goodwill but it was not an actual loyalty scheme in which goods or services are distributed to customers as rewards for continued patronage. A decade after the CJEU delivered its decision in the *Boots* discount voucher case, the European Court was asked to rule on the application of VAT to

²⁵ Various VAT systems refer to the recovery of tax incurred on acquisitions as a “deduction” from output tax or an “input tax credit”. The UK law describes it as a credit for input tax, defined as tax imposed on supplies made to a taxable person, which can be deducted from output tax. See *Value Added Tax Act 1994* ss 24(1) and 25 (2).

²⁶ Council Directive 2006/112/EC, art. 1(2). This stands in marked contrast to the income tax which has no similar principle and can be subject to double taxation in a single jurisdiction as is the case, for example, with income derived through a company and taxed once when realised by the company and again when distributed to the shareholder.

²⁷ C-126/88, *Boots Co plc v Customs and Excise Commissioners*, EU:C:1990:136.

supplies of conventional customer loyalty rewards. The programme in question was operated by Kuwait Petroleum at its UK stores known as ‘Q8 petrol stations’. Customers buying Q8 petrol received vouchers for every 12 litres of petrol purchased. The voucher could be redeemed for goods set out in a scheme catalogue.

Both UK law²⁸ and the governing VAT Directive²⁹ of the then European Community (as the collection of member states was known at the time) deemed there to be a taxable supply for consideration when businesses provided ‘gifts’ to customers. The UK revenue authority characterized the distribution of goods or services upon redemption of customers’ loyalty vouchers as ‘gifts’ and on that basis assessed Kuwait Petroleum for VAT on the supply of redemption merchandise for market value.

Kuwait Petroleum appealed the assessment, arguing there was no gift on the facts since petrol at Q8 stations was sold at a premium price that included a specific component in the cost per litre to cover the cost of the loyalty rewards. Under this interpretation, customers who redeemed their vouchers had already paid for their ‘free’ rewards. What the customers received, under this view, was merely delivery of goods that had been paid for previously.

From a VAT policy perspective, it was clear that Kuwait Petroleum customers had already paid VAT on the full value of consumption of both petrol and rewards when they filled their petrol tanks with expensive petrol. This commercial reality was reflected in the fact that the retailer did not seek any further consideration when it distributed loyalty rewards. The optimal policy outcome could have been achieved on Kuwait Petroleum’s appeal to the VAT and Duties Tribunal³⁰ had the Tribunal decided that, for VAT purposes, the consideration paid by customers should be allocated to both the petrol and any loyalty rewards they received so the redemption involved no ‘gift’ from Q8.

As a matter of ‘English contract law’, the Tribunal said, the consideration paid was for petrol only and separately the retailer had made a unilateral offer to provide gift vouchers to the customer.³¹ Resolution of the case, however, would turn not on the English contract law concept of consideration, the Tribunal concluded, but rather the meaning of the concept in VAT law.

The Tribunal referred to the CJEU for a preliminary ruling on whether the distribution of merchandise upon redemption of loyalty coupons amounted to a ‘gift’ that under the EU VAT Directive and consequently UK law would be deemed to be a taxable supply for consideration. The CJEU, hearing argument from the UK as well as interventions by the Portuguese and French governments and the European Commission in *Kuwait Petroleum*

²⁸ VATA 1994 Sch 4, para 5.

²⁹ Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (77/288/EEC), art 5(6).

³⁰ The VAT and Duties Tribunal was a predecessor to the current Tax Tribunal system. As a result of the *Tribunals, Courts and Enforcement Act 2007*, the VAT and Duties Tribunal was replaced by the First-tier Tribunal (Tax Chamber) in 2008. At the same time, an appellate tribunal body, the Upper Tribunal, was created to hear appeals against decisions of lower tribunals. The Upper Tribunal (Tax and Chancery Chamber) assumed responsibility for tax appeals that would have been made to the High Court previously.

³¹ *Kuwait Petroleum (GB) Ltd v Commissioners of Customs and Excise* [1997] Lexis Citation 3219; LON 95/2338A, at [87] (VAT Tribunal).

(GB) *Ltd v Customs and Excise Commissioners*, noted that the VAT should operate as a tax on consumption.³² At the same time, it concluded the definition of consideration for VAT purposes should be determined strictly on the basis of ‘a legal relationship between the supplier and the purchaser entailing reciprocal performance’, describing the relationship in terms similar to those used in the common law definition of a contractual relationship.³³ The contractual relationship in *Kuwait Petroleum* was only for the sale of petrol. The entitlement to future rewards derived from a commitment by the vendor outside the reciprocal sale and purchase agreement.

On return of the matter to the UK courts, the strict legal interpretation tying consideration to contractual obligations was applied by the Tribunal³⁴ and upheld on appeal by the High Court.³⁵ The High Court expressly rejected the call by counsel for Kuwait Petroleum for an inquiry of ‘commercial reality’³⁶ in favour of the legal relationship between the parties and formal transaction evidenced by the invoices provided to customers showing only that payments were made for petrol. No part of those initial payments was specified to be consideration for future distributions of rewards. The rewards, therefore, were regarded as supplies for no consideration, triggering a deeming rule that treated the supply of rewards as a supply for the full market value of the goods.

The result was double taxation of a portion of the customers’ consumption, once when they paid a higher price for petrol to obtain reward coupons and again when they redeemed the coupons for merchandise.³⁷ Commercial imperatives ensured loyalty schemes would survive but in the face of the CJEU decision imposing double tax on a single cash outlay by consumers, enterprises explored other arrangements that might mitigate the outcome.

Tesco and Total: Relief through the backdoor?

Following the *Boots* and *Kuwait Petroleum* decisions, it had become apparent that double taxation could be avoided with simple rebate vouchers issued at the time of sale but provision of goods through a full loyalty plan would trigger a second tax liability when the loyalty entitlement provided on an initial sale was redeemed. Unable to avoid the tax on redemption, UK retailers looked for alternative paths to avoid double taxation, in particular a way to exclude from the taxable value of the original sale the portion of consideration that would be used to supply the loyalty reward in the future. They sought to do this, however, without changing the contract with the customer as the entire marketing premise of loyalty schemes was the customer’s understanding that rewards were a consequence of loyalty and followed ordinary purchases.

³² C-48/97 *Kuwait Petroleum (GB) Ltd v Customs and Excise Commissioners*, EU:C:1999:203.

³³ *Ibid*, para 26.

³⁴ *Kuwait Petroleum (GB) Ltd v Customs and Excise Commissioners* [2000] BVC 2300; [2000] STI 1055 (VAT Tribunal).

³⁵ *Kuwait Petroleum (GB) Ltd v The Commissioners of Customs and Excise* [2001] STC 62 (Ch).

³⁶ *Ibid*, para 31.

³⁷ Whittock argues the *Kuwait Petroleum* decision is correct as a matter of law based on the words of the legislation but wrong in terms of the policy outcome. See N Whittock, ‘Sales Promotion Techniques and VAT’ (2018) 27 EC Tax Rev 127.

The Tesco supermarket chain moved to a new generation of loyalty scheme in which loyal customers who had accumulated sufficient loyalty points were rewarded with vouchers with specific face values that could then be redeemed for merchandise as the equivalent of cash in a Tesco store. The vouchers differed from those in *Boots* as they were tied to a continuing loyalty scheme and would not, therefore, be treated as price discount or rebate coupons that related to a single sale. Tesco did not dispute the fact that VAT would be payable when the vouchers were redeemed for loyalty rewards but instead sought to reduce the value of sales in each tax period by the value of reward vouchers issued in the period. It hoped to distinguish the decision in *Kuwait Petroleum* by connecting the original consideration paid by customers to the value of vouchers issued, without reference to the redemption of the vouchers, the issue litigated in *Kuwait Petroleum*. The VAT rules for gift vouchers disregarded consideration for the supply of a voucher with a stated face value and instead treated it as the equivalent of cash consideration when the voucher was redeemed.³⁸

The VAT Tribunal agreed with the retailer's submission in *Tesco Plc v Customs and Excise Commissioners*³⁹ and on appeal to the High Court, Ferris J. noted that if Tesco were not allowed to recover VAT on the value of the vouchers, that value would, in the words of the Court, 'have suffered VAT twice'.⁴⁰ The Court nevertheless reversed the Tribunal's decision, relying, *inter alia*, on the approach taken by the CJEU in *Kuwait Petroleum*, namely the finding that there was no direct nexus between the original payment and the subsequent reward. In support of this finding, the High Court had noted that customers paid the same price whether or not they were loyalty club members. The decision was upheld by the Court of Appeal on the same basis.⁴¹

Cognizant of the double taxation risks of direct reward provision (as shown by *Kuwait Petroleum*) and the use of vouchers that can be applied as payment for further supplies (as shown by *Tesco*), Total UK Ltd, another petrol retailer, tried a different approach to avoiding the second level of tax. The retailer in *Total UK Ltd v Customs and Excise Commissioners*⁴² rewarded its customers with vouchers purchased from well-known third party retailers. It sought to avoid double taxation of the rewards by reducing the taxable value of sales in a tax period by the value of vouchers purchased for loyal customers in the period, treating the cost as a deferred "reduction" in the sales price.⁴³ The scheme was distinguishable from that in *Tesco* because of the cash outlay to a third party, demonstrating an actual cost to the retailer when the vouchers were acquired.

The distinction failed to impress the VAT Tribunal, however. Once again, the Tribunal referred to the absence of a direct link between the initial payments and the separate acquisitions of vouchers by Total for distribution to customers as the reason the acquisition of

³⁸ *Value Added Tax Act 1994*, Sch. 6 para. 5, replaced by Sch.6 10A by *Finance Act 2003*.

³⁹ *Tesco Plc v Customs and Excise Commissioners* [2001] BVC 2416; [2001] V&DR 366; [2002] STI 363 (VAT Tribunal).

⁴⁰ *Tesco Plc v Customs and Excise Commissioners* [2002] EWHC 2131; [2002] STC 1332 (Ch), para 15.

⁴¹ *Tesco Plc v Customs and Excise Commissioners* [2003] EWCA Civ 1367; [2003] STC 1561 (CA).

⁴² *Total UK Ltd v Customs and Excise Commissioners* [2006] STI 1422 (VAT Tribunal).

⁴³ VAT Directive 77/388 Art. 11C.1 allowed taxable persons to reduce the taxable amount of sales by any subsequent reduction in sales price.

vouchers would not affect recognition of the full cost initially paid by customers for their petrol.⁴⁴ The retailer was successful with its appeal to the High Court.⁴⁵ That Court distinguished *Kuwait Petroleum*, concluding the CJEU judgment in the earlier case only dealt with the VAT liability when a reward was passed on to a customer and did not address the question of a reduction in the taxable value of the original consideration paid when customers filled their tanks with petrol.⁴⁶ The voucher passed on to the retailer, the Court concluded, amounted to a reduction in the original purchase price for loyal customers and reduction of the taxable value of sales in the tax period in which vouchers were purchased would be an appropriate means of recognizing this outcome.

The conclusion was rejected by the Court of Appeal, however, which reinstated the decision of the VAT Tribunal, again relying on the strict contractual approach used by the CJEU in *Kuwait Petroleum*:

[T]he supply of fuel and the transfer of a voucher cannot be said to be a single economic transaction. They are, or form part of, separate transactions, in the same way as the supply of fuel and the supply of redemption goods were held in *Kuwait Petroleum* to be separate transactions.⁴⁷

After almost a decade of litigation, retailers had yet to find a loyalty scheme that avoided double taxation.

Loyalty Management: Luxembourg has spoken. Or has it?

While the owners of the Tesco supermarket chain were looking at internally-generated vouchers as a means of avoiding double tax on loyalty benefits, their principal competitor, the Sainsbury's group, followed a different path, signing up for the Nectar loyalty scheme, a programme operated by a loyalty management enterprise, aptly named Loyalty Management. Consumers signing up to the Nectar programme are provided with a Nectar card and accumulate points with purchases from participating merchants. Participating retailers pay the loyalty scheme manager for the points they issue to card holders and the manager, in turn, pays the same or other retailers for goods and services that are redeemed by card holders using accumulated points. The amount received by the manager for issuing points is higher than the amount retailers agree to receive for redeeming points, yielding the loyalty scheme manager's profit margin.

In many respects, the Nectar scheme was similar to all other loyalty arrangements, with the retailer using part of the original consideration to pay for the rewards given to loyal customers, directly in *Kuwait Petroleum*, and via internally generated vouchers in *Tesco*, externally purchased vouchers in *Total*, and points purchased from a third party in the case of the Nectar plan that was considered in *Loyalty Management*. The key difference with the arrangement in *Loyalty Management* was that the retailer paid a third party for loyalty benefits and acquired the right to give points to customers as opposed to a direct distribution

⁴⁴ Ibid.

⁴⁵ *Total UK Ltd v Customs and Excise Commissioners* [2006] EWHC 3422; [2007] STC 564 (Ch).

⁴⁶ Ibid, para 42.

⁴⁷ *Total UK Ltd v Customs and Excise Commissioners* [2007] EWCA Civ 987; [2008] STC 19 (CA), para 66.

of vouchers. The customers could then redeem the points with the loyalty scheme manager for goods and services at participating redemption retailers.

While no VAT was explicitly imposed on the provision of points by a retailer to its customers, the sale by Loyalty Management to retailers of the right to give points to customers was a taxable supply. Retailers such as Sainsbury's thus paid a tax-inclusive amount to Loyalty Management and immediately recovered the VAT by deducting the tax included in the price of their acquisitions as allowed by VAT law to remove tax from business-to-business transactions.

Loyalty Management treated the amount received from retailers for the right to issue points as consideration for taxable supplies and amounts paid to suppliers who provided merchandise or services in return for redeemed points as consideration for taxable acquisitions, claiming deductions for input tax in respect of the payments. Had the deduction claims been allowed, all VAT other than that borne by a customer on the original purchase would have been recovered by the businesses transacting with one another.

The arrangements fell apart when HMRC denied Loyalty Management a credit for the VAT it paid to participating merchants for goods and services redeemed by loyalty club members, arguing it was the consumers buying the items and Loyalty Management was merely a third party paying on behalf of the club members. However, the VAT and Duties Tribunal hearing the appeal by Loyalty Management against its VAT assessment concluded, on the facts, that the supplies in question were made to Loyalty Management and not the consumers redeeming points with Loyalty Management for the goods and services in question.⁴⁸ The programme manager was thus, under the Tribunal's reasoning, entitled to a credit for VAT included in the price it paid to merchants providing goods or services to programme members redeeming their loyalty points.⁴⁹

Importantly, the Tribunal explained how its conclusion was consistent with the policy of the VAT:

...value added tax is a tax on consumption, which is applied up to the retail stage (the supply to the final consumer) whatever the number of transactions in the production and distribution process. On the facts of this appeal the customer pays the full amount of value added tax when he purchases the primary goods from a retailer. He does not pay anything for the acquisition of the secondary goods from the supplier... If [Loyalty Management] were entitled to credit for input tax on the supply made by the supplier, the amount of tax payable on the whole transaction would be the amount paid by the customer to the retailer for the primary goods (and that is the only amount paid by the customer). However, if [Loyalty Management] were not entitled to credit for input tax on the supply made by the supplier, then the total tax on the production and distribution process would exceed that paid by the final consumer, namely the customer.⁵⁰

⁴⁸ *Revenue and Customs Commissioners v Loyalty Management UK Ltd* [2005] BVC 2628; [2005] V&DR 377 (VAT and Duties Tribunal).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, para 48.

The Tribunal declined to request a preliminary ruling from the CJEU, concluding the resolution of the dispute turned solely on an interpretation of the facts, not a provision of the VAT Directive. HMRC appealed the substantive decision successfully to the High Court,⁵¹ which ignored the policy considerations relied on by the Tribunal and instead focused solely on a legalistic categorization of the distribution of goods and services to loyalty club members. The Court accepted HMRC's characterisation of Loyalty Management's payments as third party consideration for supplies to the loyalty members who redeemed points and accordingly denied Loyalty Management input tax deductions for the acquisitions. That decision was reversed on appeal to the Court of Appeal,⁵² which agreed with the Tribunal's conclusion that the payments from Loyalty Management to the redeeming enterprises were consideration for services provided to Loyalty Management, entitling the firm to input tax credits. The Court also agreed with the Tribunal's conclusion that the case involved no interpretation of the VAT Directive that required clarification from the CJEU and declined to request a ruling from that body.

Paralleling the *Loyalty Management* litigation was an appeal by Baxi Group Ltd, a manufacturer and retailer that operated its own loyalty scheme through a wholly-owned loyalty manager subsidiary. The retailer's appeal of its assessment and subsequent HMRC appeals, in *Baxi Group Ltd v Revenue and Customs Commissioners* wound their way through the VAT Tribunal,⁵³ High Court,⁵⁴ and Court of Appeal⁵⁵ before HMRC sought leave to appeal to the House of Lords at the same time as the application for leave to appeal the decision of the Court of Appeal in *Loyalty Management* reached the House of Lords.⁵⁶ Following oral submissions, the Law Lords agreed to request preliminary rulings from the CJEU in both cases. Shortly afterwards, the CJEU ordered the two referrals to be joined.⁵⁷

Notwithstanding the joinder of the *Baxi* and *Loyalty Management* referrals, the CJEU in effect issued separate rulings for the two cases in its combined judgment.⁵⁸ The decision in respect of *Baxi* set out an unambiguous application of the law, consistent with past CJEU rulings on the subject. When the matter returned to the UK, the dispute over the assessment was resolved without further court hearings. The decision in respect of the *Loyalty Management* referral, in contrast, explicitly returned to the UK court responsibility for determining how the CJEU ruling would apply to the particular facts of that case.

The CJEU concluded similarly to the High Court in the second case, indicating Loyalty Management was making third party payments for goods and services acquired by the loyalty

⁵¹ *Revenue and Customs Commissioners v Loyalty Management UK Ltd* [2006] EWHC 1498; [2007] STC 536 (Ch).

⁵² *Revenue and Customs Commissioners v Loyalty Management UK Ltd* [2007] EWCA Civ 965; [2008] STC 59; *Times*, 10 October 2007 (CA).

⁵³ *Baxi Group Ltd v Revenue and Customs Commissioners* [2006] BVC 2553; [2006] STI 1369 (VAT and Duties Tribunal).

⁵⁴ *Baxi Group Ltd v Revenue and Customs Commissioners* [2006] EWHC 3353; [2008] STC 42 (Ch).

⁵⁵ *Baxi Group Ltd v Revenue and Customs Commissioners* [2007] EWCA Civ 1378; [2008] STC 491 (CA).

⁵⁶ Oral submissions were made on 15 December 2008.

⁵⁷ The *Loyalty Management* referral reached the CJEU on 6 February 2009 and the *Baxi Group Ltd* referral on 8 February 2009. The CJEU president ordered the two referrals to be joined on 11 March 2009.

⁵⁸ Joined Cases C-53/09 & 55/09, *Revenue and Customs Commissioners v Loyalty Management (UK) Ltd and Revenue and Customs Commissioners v Baxi Group Ltd*, EU:C:2010:590 (2nd Chamber).

programme members and was therefore not entitled to input tax credits. The CJEU accepted the VAT principle that, however many transactions there may be on the way to final consumption, the tax should be exactly proportional to the price of the final consumption.⁵⁹ However, applying the approach that it had used in *Kuwait Petroleum*, the CJEU found there was no connection between the consideration paid by consumers initially and the later receipt of rewards.⁶⁰ In the eyes of the CJEU, the ‘economic reality’ of the transactions was two separate supplies to the loyalty scheme members⁶¹ – the initial supply by the retailer and the later supply of goods or services as loyalty points were redeemed, with the price of the first paid by the final consumer and the second paid by Loyalty Management for the benefit of the final consumer.

A consequence of this conclusion was that Loyalty Management was not entitled to a deduction for the VAT it paid. As a result, unrecoverable VAT was imposed on a sum greater than the amount paid for consumption by the final consumer, an outcome clearly inconsistent with the principle of VAT as a tax on the value of final consumption.⁶²

When the matter returned to the Supreme Court, as the House of Lords had been renamed, two members of the five member panel favoured a direct application of the CJEU decision; in the words of Lord Carnwath, previously quoted, ‘Luxembourg has spoken’ and there was therefore no room for alternative views.⁶³ The majority, including Lord Walker, who had been a member of the initial House of Lords panel that sought the opinion of the CJEU, followed a different path, allowing Loyalty Management to recover fully the VAT included in the cost of rewards distributed to loyalty club members. In hindsight, Lord Walker suggested, it would have been better not to have made a reference.⁶⁴ The dispute turned not on interpretation of EU law but rather the ‘economic reality’ of the arrangements, an issue best decided by national courts, he concluded.⁶⁵ Dismissing the approach of the CJEU, he stated:

Anyone with even a passing acquaintance with value-added tax is familiar with the basic concept of the fiscal neutrality of a chain of transactions which, however short or long, leaves the burden of the tax on the ultimate consumer.⁶⁶

⁵⁹ Ibid, para 38.

⁶⁰ Ibid, paras 53-55.

⁶¹ Ibid, para 42.

⁶² As Watson and Garcia put it, it was difficult to read the decision of the CJEU ‘without shedding tears of disappointment and frustration’; J Watson and K Garcia, ‘Babylonian Confusion Following the CJEU’s Decision on Loyalty Rewards’ (2011) 22 *International VAT Monitor* 12.

⁶³ *HMRC v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* (SC) (n 1), heading following para 119 and paras 120-123 et seq, [per Lord Carnwath \(with whom Lord Wilson agreed\)](#).

⁶⁴ Ibid, para 118. The Court implicitly appears to have disagreed with the view of Morse and de la Feria who suggested ‘it is extremely difficult to argue that the House of Lords had any choice but to refer the matter to the CJEU’; see G Morse and R de la Feria, ‘HMRC v Aimia Coalition Loyalty UK Ltd (UKSC): A Question Too Far? Identifying Supplies to Separate Recipients From a Single Transaction Whilst Circumventing the CJEU’s Response to a Reference’ [2013] *British Tax Rev* 287, 289.

⁶⁵ *Her Majesty’s Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* (SC) (n 1), para 118.

⁶⁶ Ibid, para 113.

The CJEU's approach, looking at transactions in isolation, would yield an acceptable outcome in a purely linear transaction but in modern developed economies such transactions are relatively rare.⁶⁷ The construct of a contractual relationship in modern economies, Lord Walker noted, is more like a web than a chain and when determining the economic reality it is necessary to look at the matter as a whole.⁶⁸ If tax were imposed on the initial sale and the reward, double taxation would follow but the appropriate tax burden would be achieved if it were recognized that redeemers are making a supply to the loyalty programme manager, not to the consumers. This, Lord Reed emphasised, requires tax authorities to look at the series of transactions in their entirety, an approach that accords with the basic principle of VAT.⁶⁹

The *Loyalty Management* case marked a sharp turn in the application by UK courts of CJEU preliminary rulings on the operation of UK VAT legislation. Until this point, UK courts had consistently followed CJEU preliminary rulings in both VAT cases repatriated to the UK by the European court and in decisions on the VAT outcomes of similar transactions. In *Loyalty Management*, the highest appellate court in the UK declined to follow a decision of the CJEU not in a similar case but in the exact case on which the CJEU had made the preliminary ruling. Using the tools of the common law, it was able to follow a different path not by explicitly rejecting the authority of the CJEU but instead by distinguishing the preliminary ruling, concluding the issue to be resolved was actually different from that considered by the European court.⁷⁰ The UK court achieved an outcome consistent with the fundamental principles of VAT law by looking past the transactions considered separately (and from a policy perspective, out of context) by the CJEU to the full set of arrangements put in place by the final consumer, the initial retailer, the loyalty programme manager, and the loyalty redemption retailer. The full value of consumption was, consequently, subject to tax and double tax was avoided.

Following the Supreme Court's decision in *Loyalty Management*, HMRC sought a second reference to the CJEU, a procedure HMRC argued should be followed when the national court encounters difficulties in understanding or applying a CJEU judgment or where the national court does not reach a unanimous decision, signifying the matter is not *acte clair* in terms of European law.⁷¹ The Supreme Court turned down the request, indicating it did not believe it had encountered any difficulty applying EU law. Its decision differed from that of the CJEU only because it looked at the transaction giving rise to the tax dispute in the context of a broader set of facts than those considered by the CJEU. This, the Supreme Court, declared, was in the prerogative of a national court. The UK had spoken.

⁶⁷ Lord Walker lucidly explains this economic substance in paras 113-114.

⁶⁸ *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* (SC) (n 1), para 114.

⁶⁹ *Ibid*, para 85. Lord Hope and Lord Walker delivered separate judgments for the majority.

⁷⁰ The approach is in stark contrast to the civil law resolution of differences as illustrated in the Danish Supreme Court decision in Case 15/2014, *Dansk Industri (DI) acting for Ajos A/S v the estate left by A* where the court said it was expressly unable as a matter of national law to apply an ECJ preliminary ruling. See further R Holdgaard, D Elkan and G Krohn Schaldemose, 'From Cooperation to Collision: The ECJ's *Ajos* Ruling and the Danish Supreme Court's Refusal to Comply' (2018) 55 CML Rev 17.

⁷¹ *Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited (formerly known as Loyalty Management UK Limited)* (No 2) [2013] UKSC 42 (SC).

Marriott and Tesco Freetime: The UK has spoken

UK decisions on loyalty programmes in the post-*Loyalty Management* era have followed a very different track from those prior to the judgment of the Supreme Court.

The taxable person in the first loyalty case to follow the *Loyalty Management* decision, *Marriott Rewards LLC, Whitbread Group plc v The Commissioners for Her Majesty's Revenue and Customs*,⁷² was a subsidiary in, and loyalty manager for, the Marriott hotel group. The taxable person received payments from franchised hotels that provided their customers with loyalty points and paid the same or other hotels for rooms used by loyalty club members who redeemed their points. HMRC had denied Marriott Rewards, the loyalty manager, deductions for the VAT included in its payments to redemption suppliers and Marriott Rewards appealed, arguing its arrangements were indistinguishable from those in *Loyalty Management* and it should therefore be allowed the deduction it sought. The tax administration sought to distinguish the facts in *Marriott Rewards* from those in *Loyalty Management* by arguing the loyalty manager in *Marriott Rewards* was simply part of an in-house programme operated by the franchisor and payments to redeeming hotels were for third-party purchases on behalf of loyalty programme members.

At first instance, the Tribunal hearing the appeal rejected the distinction offered by HMRC,⁷³ effectively extending the *Loyalty Management* holding to the facts in *Marriott Rewards*. The appellate Upper Tribunal agreed, describing the relevant arrangements as 'indistinguishable' from those in *Loyalty Management*.⁷⁴ Following a detailed explanation of the policy objective of VAT,⁷⁵ the Upper Tribunal allowed the programme operator to claim input tax credits for the tax included in the cost of redemption rooms. If the loyalty programme manager were not able to recover the VAT included in the cost of hotel rooms provided to customers, the Upper Tribunal pointed out, the assessments would 'give rise to more VAT being paid to HMRC than principle should permit'.⁷⁶

The success of the taxpayer in *Loyalty Management* prompted the Tesco chain, which, as noted earlier, had unsuccessfully attempted more than a decade earlier to avoid double taxation in its loyalty programme by reducing its taxable sales by the value of vouchers issued in a tax period, to revisit the VAT consequences of its loyalty programme. Subsequent to the tax periods covered in the original dispute, Tesco had modified its scheme by offering customers a 'reward token' option that enabled them to convert loyalty vouchers to tokens that could in turn be redeemed for goods and services from other retailers. The programme was run through a loyalty programme manager firm within the company group, Tesco Freetime, and was not dissimilar to other programmes operated through managers within a group or external managers. As the loyalty programme managers had attempted to do in *Loyalty Management* and *Marriott*, the manager in the second Tesco loyalty case, *Tesco*

⁷² *Marriott Rewards LLC; Whitbread Group plc v HMRC* [2017] UKFTT 140 (TC) (First Tier Tribunal).

⁷³ *Ibid.*

⁷⁴ *Marriott Rewards LLC; Whitbread Group plc v HMRC* [2018] UKUT 0129 (Upper Tribunal).

⁷⁵ *Ibid.*, para 21.

⁷⁶ *Ibid.*, para 22.

Freetime Ltd, Tesco plc v HMRC, sought input tax credits for the VAT included in its payments to third-party loyalty reward providers.⁷⁷

An initial argument apparently put forward by HMRC to the Tribunal hearing Tesco Freetime's appeal was that the Tribunal should disregard the decision of the majority in the Supreme Court in *Loyalty Management* and instead follow the guidance of the minority, treating the CJEU decision in *Loyalty Management* as binding precedent. A second argument distinguished the facts from those in *Loyalty Management*, where the loyalty manager operated the entire scheme while in *Tesco Freetime* the loyalty manager only managed the programme for consumers who opted to convert their vouchers to reward tokens.

The Tribunal made it clear it understood the conclusion of the minority in *Loyalty Management* that the view of the CJEU should prevail but indicated the decision by judges at the highest level in the UK was a binding precedent on the Tribunal, even if that differs from the holding of the CJEU. Looking at the arrangements in their entirety, the Tribunal declared that it was 'plain beyond argument ... that the whole scheme is funded by the customer's taxed payment',⁷⁸ with the implication that VAT should be levied only once on the value of the loyalty reward. This outcome can only be achieved if the second layer of tax on a loyalty reward, payable at the time of redemption, is offset by a VAT deduction in the course of the overall arrangements. HMRC's appeal of the Tribunal decision to the Upper Tribunal was unsuccessful.⁷⁹ The Upper Tribunal worked within the constraints of precedents and accepted the original holding in *Kuwait Petroleum* that led to the distribution of rewards being treated as taxable supplies. By upholding the Tribunal's decision and allowing full recovery of input tax credits along the business supply chain, the Upper Tribunal effectively removed double taxation from the rewards. Significantly, the Upper Tribunal noted the higher level rationale for the decision: "the apparently free gift, either by way of redemption goods and Rewards, is in economic reality paid for by Tesco's customers as a whole."⁸⁰ The judgment set out unambiguously the commercial reality not considered by the CJEU in *Kuwait Petroleum*.

The paths diverge

Viewed from a VAT policy perspective, the tax jurisprudence of the CJEU has often appeared to veer off course, particularly in respect of its interpretation of VAT law. Time and again, the Court has adopted positions inconsistent with the fundamental policy principle of a VAT that tax should only be imposed on final consumption and removed from business-to-business supplies along the commercial chain to final consumption. In some cases, the CJEU has later recognized the occasions when its rulings undermined the aims of the law and has been able to subsequently reverse or limit the impact of the initial decisions.⁸¹ In the case

⁷⁷ *Tesco Freetime Limited, Tesco plc v HMRC* [2017] UKFTT 614 (TC) (First Tier Tribunal).

⁷⁸ *Ibid*, para 94.

⁷⁹ *HMRC v Tesco Freetime Ltd, Tesco PLC* [2019] UKUT 0018 (TCC) (Upper Tribunal).

⁸⁰ *Ibid*, para 56.

⁸¹ For example, a decision that there was no supply (and hence no consumption) when customers acquired and chose not to exercise an option for hotel accommodation labelled a deposit (C-277/05, *Société thermale d'Eugénie-les-Bains v Ministère de L'Économie, des Finances et de L'Industrie*, EU:C:2007:440) was effectively reversed in a later decision where customers acquired and did not use non-refundable discount air tickets: Joined Cases C-250/14 & 289/14, *Air France-KLM, formerly Air France and Hop!-Brit Air SAS*,

of loyalty scheme benefits, however, the CJEU appears not to have appreciated that its original decision in *Kuwait Petroleum* led to double taxation of one part of what had become an ordinary multi-element consumer transaction. Moreover, the unambiguous and sharply delineated reasoning in the judgment arguably left it with little room to distinguish the precedent in similar fact situations.

In the absence of a complete reversal by the CJEU of its decision in *Kuwait Petroleum*, the only path to overcoming the consequences of that decision would be to allow enterprises involved in loyalty schemes to recover fully any further tax paid in respect of distributed rewards. Enterprises offering loyalty schemes accepted the fact that tax would be payable on distribution of loyalty rewards and developed arguments to recover the second tax burden indirectly, through offsetting input tax deductions on another element of the several transactions involved in modern loyalty schemes. Failing to appreciate both the double tax consequence of its original decision in *Kuwait Petroleum* and the preferable policy outcome, the CJEU ruled repeatedly against enterprises seeking indirect recovery of the tax.

In this sense, the CJEU decision in *Loyalty Management* was entirely consistent with the previous CJEU loyalty scheme decision, leaving intact double taxation of consumption via loyalty schemes. The reaction of the UK court responsible for applying the preliminary ruling, however, was strikingly different from the chain of preceding UK decisions that had consistently and uncritically applied the CJEU decisions. Declining to adopt the CJEU position, the UK Supreme Court in its *Loyalty Management* decision took a fundamentally different approach, in the process opening a new path for UK jurisprudence that runs not in parallel but instead in an increasingly divergent direction from that of the CJEU.

The decision of the Supreme Court in *Loyalty Management* preceded the Brexit referendum by three years⁸² and post-Brexit UK courts are no longer bound by the EU treaty or subsequent decisions of the EU court. In a legal system built on the doctrine of precedent, courts do not depart lightly from prior binding decisions. The VAT law itself was built on, and conforms with, what was at the time of its enactment the prescriptive European model. The legislation is likely to remain closely similar in form to its European counterparts long into the future. These factors all point to the likelihood of ongoing reliance on CJEU judgments. The decision of the Supreme Court in *Loyalty Management* along with subsequent tribunal and lower court decisions in the UK suggest, however, that these similar laws may be interpreted and applied in vastly different ways on opposite sides of the waters separating the UK from its former continental partners.⁸³

formerly *Brit Air contre Ministère des Finances et des Comptes publics*, EU:C:2015:841. Similarly, the court found a way to circumvent the impact of a decision preventing a holding company from claiming input tax credits (C-60/90, *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accijnzen*, EU:C:1991:268) by distinguishing the result any time a holding company appeared to provide any service to its subsidiaries (C-142/99, *Floridiene SA and another v Belgian State*, EU:C:2000:623).

⁸² The government announced in January 2013 there would be a referendum if it were re-elected in 2015. The European Union Referendum Act 2015 established a legal basis for the referendum and the *United Kingdom European Union membership referendum* was held in June 2016.

⁸³ The approach taken by the Supreme Court in *Loyalty Management* stands in contrast with that taken by courts in some other EU jurisdictions. Dutch courts, for example, fully follow CJEU preliminary judgments even if, one study suggests, the Dutch judges think the CJEU interpreted law or the facts of a case wrongly. See further,

Jasper Krommendijk, 'The highest Dutch courts and the preliminary ruling procedure: Critically obedient interlocutors of the Court of Justice' (2019) 25 ELJ 394.